IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents

AMICI CURIAE BRIEF OF DAVID E. ALLGOOD, AN INFANT, ETC., ET AL

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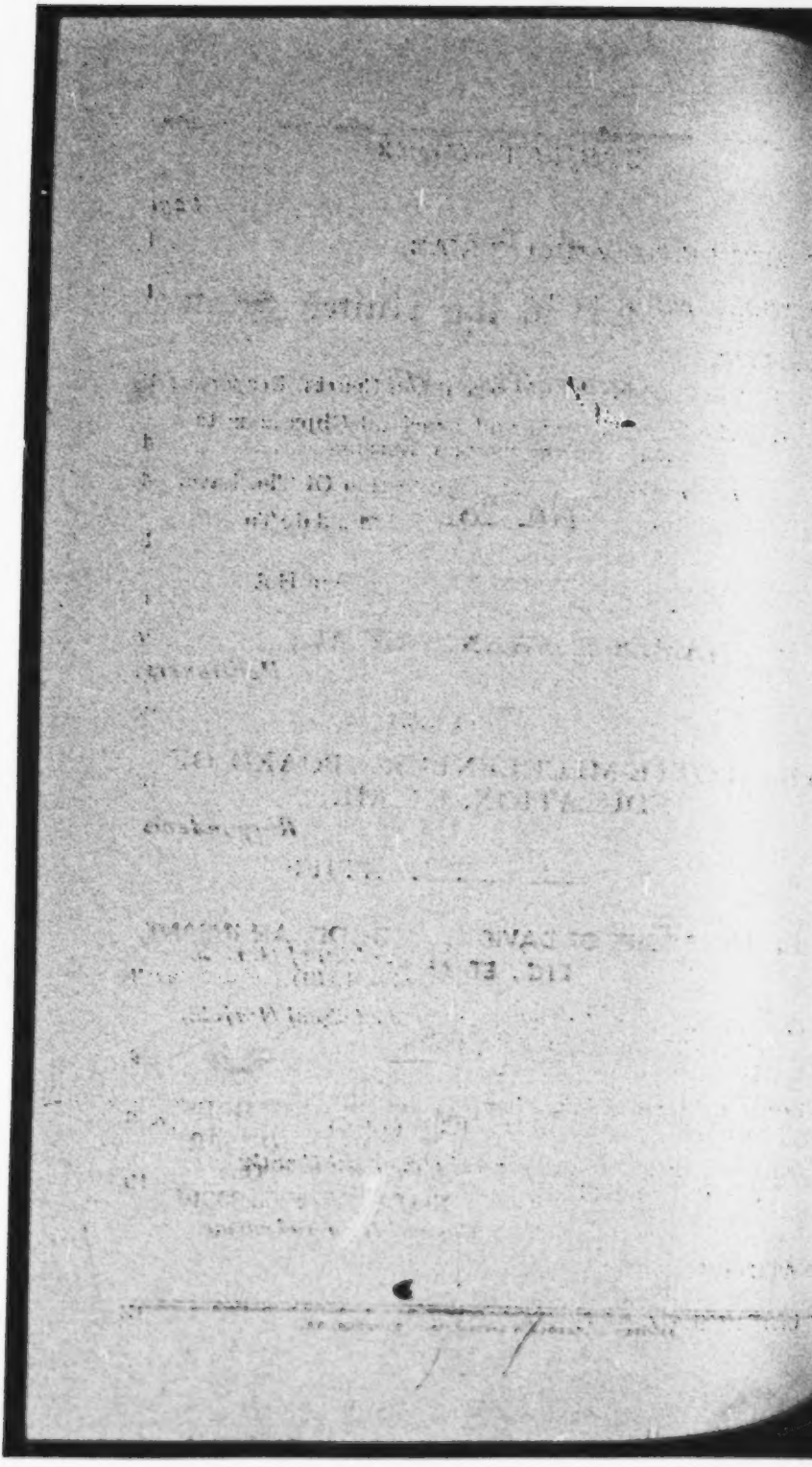

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QUESTIONS ADDRESSED

al Balancing and Bussing Required or Permitted Constitution?

ace Be the Prime Consideration in School Assign-

HE INTEREST OF THE AMICI CURIAE

brief is filed on behalf of David E. Allgood, his father, Lloyd C. Allgood, and others, here-ferred to as Concerned Citizens of Norfolk, efendant-intervenors in the Norfolk, Virginia, egregation case *Beckett, et al.* v. *The School*

Board of the City of Norfolk, Virginia, et al., now on appeal to the Court of Appeals for the Fourth Circuit. These defendant-intervenors are a class consisting of Norfolk school children and their parents. Most of the children were born after the 1954 *Brown* decision; many of the children are entering for the first time a school system in a state that formerly had legally segregated schools. The Concerned Citizens of Norfolk are both black and white.

The order of the district court in the Norfolk school case, according to the findings of fact contained therein, arbitrarily busses Norfolk children, many living within walking distance of a school which can accommodate them, to a distant school against their will merely to place them with children of another race.

In the present case, the children of Charlotte and Mecklenburg County, North Carolina, are under court order which affects them in the same way as the children of Norfolk are affected. The decision in this case will determine the outcome of the Norfolk case. This brief is filed with the consent of the parties to assist the court in reaching a decision that will not deny equal protection of the law to the Charlotte and Mecklenburg County children or the Norfolk children and one that will not require these children to attend a school under a plan not required by the Constitution.

ARGUMENT

I—THE FACTUAL SITUATION AND THE COURTS' RESPONSE

To describe the racial composition of Charlotte and Mecklenburg County is to describe the racial composition of Norfolk, Virginia; Atlanta, Georgia; Washington, D. C.; and every other large city or metropolitan area in the country with significant numbers of

oth blacks and whites. Each has black sections, white ections, and transitional sections. Because the white ections initially are relatively large in area they are ipt to be a considerable distance from the black areas. Historically, but particularly in the past ten to fifteen years, the black sections have grown, the transitional sections have turned black and the white sections have become transitional then black.

Even though these facts have been present in all of the city school cases, each District Court and each Court of Appeals has come up with a different set of rules for desegregating the schools. This has been justified by holdings that each case rests on its own facts. A look at what has happened within the past six months shows this is not accurate. In the present case the District Court set racial balancing as the goal and ordered into effect the plan that came closest to achieving this. The District Court in the Norfolk School case has ordered racial balancing to the extent permitted by available transportation. The District Court in Richmond, Virginia, has ordered racial balancing for the 1971/72 school year. The District Court in Roanoke, Virginia, has rejected all plans that use bussing solely to achieve racial mixing.

These widely different decisions have not been the result of different factual situations in these cities. They have been the result of different interpretations of the rulings of this court.

We have not had the lower courts experimenting with different desegregation tools and different factual situations in an effort to eliminate dual school systems. We have had the lower courts experimenting with the meaning of desegregation and the meaning of "unitary school system." The need for definitions, for objective

standards, is critical. Disruption and litigation will continue and grow until such standards are established.

Most lower courts have taken the view that *regardless of any other factors* a school system is not desegregated if some of its schools contain all or almost all black pupils or some of its schools contain all or almost all white pupils. These courts have ordered bussing to eliminate schools of all black pupils and schools of all white pupils.

If this court should decree that each school district must take all feasible steps to racially balance its pupils then we would have a fairly objective standard by which school systems could be judged. We believe, however, that such a solution or standard necessarily involves insurmountable constitutional and practical objections.

II—THE CONSTITUTIONAL AND PRACTICAL OBJECTIONS TO RACIAL BALANCING AND BUSSING

[A] A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The Court has ruled that in order for children to have equal protection of the laws, no government must effectively exclude any child from any school because of his race or color. Racial balancing, however, the goal set by the lower courts, does just this. Under any city racial balancing plan, many black and white children who live within walking distance of a school which can accommodate them will be required to ride buses to distant schools solely because of their race. They will not be allowed to attend the school closest to their home solely because of their race. This effectively excludes many from their neighborhood schools solely because of their race. It is discrimination and, as such, a denial of equal protection of the laws. It is the very thing outlawed in *Brown* v. *Board of Education,* 347 U.S. 483, 99 L.Ed. 1089, (1954).

The avowed purpose in the racial-balancing-bussing schemes is equal educational opportunity. It cannot be concluded that this will be the result unless as a matter of law (since there is no evidence on the subject) it is concluded that schools with all black pupils will be inferior to other schools regardless of any other factors which may be present.

Scores on learning, progress, or intelligence tests of black pupils attending all black schools are significantly lower than the national average. It is claimed that this proves the inferiority of schools with all black pupils and their lack of equal educational opportunity. This would not be true, however, unless each child taking these tests entered a school system with the same motivations and the same level of learning as all other children. This is not the case. Much can and should be done to raise the general educational level of the culturally-deprived but this is not a Constitutional mandate. Schools can and should have faculties chosen without regard to their color. If appropriate, such faculties may be trained to meet the special needs of pupils such as culturally-deprived children. Interscholastic activities, athletic, academic, and social, should be conducted in a nondiscriminatory manner. School zone lines should be drawn in a nondiscriminatory manner. These steps effectively desegregate schools regardless of the color of pupils, without depriving any of their constitutional rights. They will provide the equal educational opportunity required.

Exactly what an equal educational opportunity entails should be given serious consideration by this court for this is involved in all questions now presented in the school cases. It does mean that each child must be given the same *opportunity* to learn. Attempts to do more than this (such as giving culturally-deprived children

the opportunity to acquire such motivation, learning, and other factors as will place them on the same footing as others except for basic intelligence) through racial balancing and bussing, do not equalize educational opportunity, but impinge upon rights of others. The ends sought do not justify or require these means.

[B] THERE IS NO CONSTITUTIONAL MANDATE TO RACIALLY BALANCING OR BUS.

This court has held that the Constitution requires a unitary school system, one in which no child is effectively excluded from any school because of his color. This court has held that all vestiges of the dual school systems must be eliminated so that there are no longer black schools or white schools, but just schools. This court has approved desegregation plans ordered into effect by District Courts when such courts have found discrimination to exist. These previous holdings of this court do not constitute a mandate to racially balance schools or even to make reasonable attempts to do so. These holdings do not require bussing solely to mix pupils. They have been so interpreted, however, which makes it imperative that these questions now be answered.

The Constitution is and must be color-blind. It is the only way that every person can receive the equal protection of the laws. Justice Marshall, then representing the NAACP, in his brief and in oral argument before this court in *Brown* v. *Board of Education, supra,* so stated. This is the premise upon which the *Brown* decision rests.

[C] RACIAL BALANCING AND BUSSING ARE NOT REASONABLE.

Even though the term *reasonable* is one familiar to the law, its meaning varies so from person to person, lawyer to lawyer and court to court, it has no real sig-

nificance. In spite of this a few lower courts (notably those in the fourth circuit—at the direction of the fourth circuit) and certain sections of the U. S. Government have adopted a desegregation policy of reasonableness. In practice this means that a school district must do everything reasonable to racially balance its schools including rezoning, bussing, pairing, grouping and relocating schools. It is submitted that all bussing for racial reasons is unreasonable, that all rezoning for racial reasons is unreasonable and that all other "tools" when employed solely for racial reasons are unreasonable.

It has been pointed out quite correctly that all these "tools" have been used in the past for valid educational reasons and also for maintaining segregated schools. This is said to justify their use to mix colors. Certainly use of such tools for valid educational purposes is reasonable and it may result in mixing of pupils. Unless such use, however, is tied to valid educational purposes (other than mixing, if this be one) those affected will consider the use unreasonable and respond accordingly, as they have in the past. Reasonableness cannot be determined in a vacuum. It must be determined with regard to those affected and their response. It has been clearly shown by the Coleman Report and all other studies that the use of these tools solely to mix the races is not generally accepted and, where employed, the middle class (white) child does not long attend the school assigned. Unless this sad fact (of white or middle class flight) is ignored, reasonableness must rule out the use of such tools solely for mixing different colored pupils.

III—NEIGHBORHOOD SCHOOLS

In a concurring opinion in the Norfolk school case, *Brewer, et al.* v. *The School Board of the City of Norfolk, Virginia* C.A. 4th Cir. (June 22, 1970), Judge Bryan stated:

". . . I express the belief that the expertise of the Board and the seasoned judgment of the District Court can formulate a design — not impinging Brown—consisting of ungerrymandered neighborhood schools supplemented by freedom of choice and other pertinent factors . . . .

"Accordingly, on account of the peculiar layout of residential Norfolk, I think the neighborhood school plan there would be altogether valid if supplemented by the freedom of choice privilege and provision for transportation at the expense of school authorities, wherever transportation is needed to make the schools accessible to the neighborhood pupils or to those exercising their freedom of choice of other schools . . ."

This is the prayer of the Concerned Citizens of Norfolk and of concerned citizens everywhere. As we previously pointed out, the residential pattern in Norfolk (with regard to race) is basically the same as in every other city or metropolitan area with significant numbers of both races. A neighborhood plan such as this effectively excludes no one from any school because of his race. It eliminates black schools and white schools. As late as 1963 in the Norfolk school case, the NAACP was asking the court for just such a school plan. It appears that throughout the fifties and the early sixties this was the prayer of the NAACP in all school cases. If such a plan was constitutional during those years, it is constitutional now.

Opposition to neighborhood school plans is based upon the fact that such plans do not eliminate schools with only black pupils and schools with only white pupils. It is contended that the placement of schools, discriminatory housing and zoning laws, and other gov-

rnmental acts caused racially segregated housing patterns which perpetuate school segregation under neighborhood plans. It is further contended that when white children are not in an obvious majority status in a school (which will occur in any neighborhood plan) they will gradually desert the school.

We do not believe such objections are constitutionally sound. Certainly there will be schools with only black pupils and schools with only white pupils. Any constitutional objection to these can be easily eliminated, however, by the nonracial assignment of teachers and administrative personnel and by nondiscriminatory interscholastic activities.

If governmental action has caused racially segregated housing patterns, ungerrymandered school zones do perpetuate dual school systems. In the present case the district court has found as a fact that segregated housing patterns were the result of governmental action. The similarity between the housing patterns in Charlotte, Mecklenburg County and those in northern cities was declared to be more apparent than real. Such a finding must be challenged for it ignores one of the cardinal precepts of the law, that of proximate cause. Experience throughout the entire country establishes without any doubt that most neighborhoods will be racially homogeneous regardless of governmental action. This fact effectively eliminates governmental action as the cause. In the Norfolk school case, *Brewer* v. *The School Board of the City of Norfolk* 308 Fed. Supp. 1274, 1303, (1969) this was recognized by the district court which found as a fact in similar circumstances that governmental action did not play a significant part in the segregation of neighborhoods.

During the past few years all discrimination in laws relating to housing has been struck down. Laws and regulations have been put into effect which actually severely discourage private discrimination in the sale and rental of housing. The location of all new schools has been under the control of the courts for the past few years. As a result, any family wishing to move knows that it will not be limited by race in choosing a new location. Further, no one can point to any particular school and say that it would not be in its present location if the school district were all one color. *Nevertheless, objections such as this to the neighborhood plan are met by a fairly administered majority to minority freedom of choice provision.* Freedom of choice has been struck down by this Court only when there has been a finding that it was administered unfairly (*Green* v. *County School Board of New Kent County,* 391 U.S. 430, [1968]). This suggests, and it is certainly true, that the success of any freedom of choice plan depends on it being administered fairly without discrimination, *not upon it mixing any particular number of different colored bodies.* There well may be only a few transfers in any freedom of choice plan. Not surprisingly, most people wish their children to go to school with those who are from backgrounds similar to theirs. If they have a constitutional right to go to school with those of another color, must they be *forced* to exercise it?

IV—WHITE FLIGHT

Most important to any decision regarding the method of desegregation (or its meaning) is the fact that "*de jure* integration" brought about by racial balancing and bussing, does not work. The refusal of white and middle-class families to send their children to schools where their race and class does not predominate is well documented. The most dramatic example is found in

the District of Columbia. In 1954 white pupil enrollment was 39 per cent of the total (about 40,000 white pupils). Since then an ambitious program of integration (as opposed to desegregation) has been undertaken. Pupil achievement in the District, which was close to the United States norm in 1954, dropped to a point far below the United States norm in 1969. Although total student enrollment rose, the number of white pupils fell to 5.6 per cent of the total in 1969 or less than 8,500 pupils out of a total of about 149,000. A study of individual schools in the District shows that when black pupil enrollment approached 30 per cent in a school, the percentage rose to 75 per cent in about four years and quickly thereafter the school had all black pupils. Over 99 per cent of the District's black pupils attend schools where they are in the great majority.

Atlanta, Georgia, did not start its school desegregation until 1960. Its experience has been the same as Washington's. In 1960, about 60 per cent of total pupils enrolled were white. In 1970 this fell to 35 per cent. At the present rate of change, Atlanta schools will have about 90 per cent black pupils in seven to ten years. New York City has had a similar experience following its school board's requirement of racial balance.

Other cities faced with the same school situation are experiencing the same change. If the present *"de jure* integration" policies continue, our large cities soon will become all black.

The net result of all this will be inevitably the destruction of confidence in public education and the erosion of the tax base upon which all school systems depend. We have already seen the beginning of this in thousands of private schools that have sprung up and are flourishing. It is now the rule rather than the

exception for school bond issues to be defeated in referenda throughout the country. This will be the end of meaningful education for most of this country's blacks.

V—THE CIVIL RIGHTS ACT OF 1964

It was within the power of Congress, specifically granted by the 14th Amendment, to enforce the Constitutional mandate to desegregate the schools. It would be most unreasonable if this power did not include the right to define terms and to set out procedures to be followed and to be avoided. This was done in the Civil Rights Act of 1964. Desegregation does not mean racial balancing and the Act so states. Bussing is neither reasonable, required nor constitutional and the Act so states. This Act can and should be given effect as an exercise of Congress's power to enforce the 14th Amendment.

CONCLUSION

The Constitutional mandate to desegregate schools, to abolish dual school systems and all vestiges of it is met when school districts are contiguous to the schools; when zone lines are drawn in a nondiscriminatory manner without regard to race; when faculties are assigned to schools without regard to race; when interscholastic activities, academic, athletic, and social, are conducted without regard to race; when, in those school districts that have Government-imposed segregated housing patterns, there is a majority to minority transfer provision; and where deviations from the above are for valid educational reasons only. This plan will not mix enough different colored pupils to suit many but it is the only plan that meets the Constitutional test of equal educational opportunity and will not completely destroy the public educational system in this country. It is the only plan that will assure to all the equal protection of the law.

Respectfully submitted,

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